A **PROJEK LEBUHRAYA UTARA-SELATAN BHD**

v.

HMD RAIS HUSSIN A MOHAMED ARIFF

B HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3 (4)-12B-120-2008]
10 MAY 2010

C ***TORT:*** *Negligence - Highway authority, liability of - Motorcar colliding with carcass of wild boar - Appellant erected fences along expressway - Whether sufficient - Whether accident likely and foreseeable - Whether respondent proved negligence against appellant*

DAMAGES: *Special damages - Claim for - Whether proven - Whether* D *respondent failed to discharge burden of proof - Whether Sessions Judge erred in awarding whole amount of special damages*

The cause of action in this case arose out of an accident which occurred on the North-South Highway involving a motorcar driven by the respondent/plaintiff and a carcass of a wild boar. At the conclusion of E the trial, the Sessions Judge allowed the respondent's claim and awarded the whole amount of special damages. It was the respondent's case that the accident happened as a result of the appellant's negligence in maintaining the North-South Expressway. The appellant denied liability, alleging they had taken all reasonable steps to ensure the safety of the F road users with regular maintenance of the expressways. The issues that arose were (i) whether the accident was caused by the appellant's negligence and (ii) whether special damages were proven.

Held (allowing the appeal; setting aside decision of Sessions Court):

G **(1)** The stretch of the expressway where the accident occurred was not a wild or stray animal prone area. As such the appellant could not have foreseen the respondent's accident. The appellant did not have a record to show that the fence at the place of the accident was damaged. Furthermore, the wild boar had a peculiar natural habitat H of digging its way under the fence or concrete wall. The appellant had erected fences along the expressway to ensure that the wild boar and/or stray animals did not enter the expressway. Since the accident spot was not identified as wild animal prone area, the fencing erected was sufficient. The law only imposed liability for a I danger that could reasonably be foreseen. That being the case, it was unreasonable to say that the appellant should ensure the fences

were not damaged and to ensure no stray animal made its way onto the highway. In the circumstances, on the balance of probabilities, the respondent had failed to prove negligence against the appellant. (paras 16 & 17)

(2) The law on proof of special damages is well settled in that it has to be strictly proven (*Guan Soon Tin Mining Co v. Wong Fook Kum*). Only the following four items were proven which were (i) cost to repair the wind screen and tinted; (ii) insurance premium payment; (iii) towing charges and (iv) cost to repair tyres. The total of all the said items came up to RM7,303.12. (para 18)

(3) The respondent had produced his motorcar insurance policy to support his claim for NCB amounting to RM11,395.82. However, the respondent failed to explain the mechanism of how he obtained the percentage and the figures. The only person qualified to testify on NCB is an officer from the insurance company itself. In the absence of acceptable explanation from the respondent, there was serious doubt as to whether the calculation and the amount claimed by the respondent were actually losses of 55% NCB and incurred as a result of the accident. As such, this claim was disallowed. (para 21)

(4) Only oral evidence was adduced by PW1 to establish depreciation value of the car. There was no independent witness to certify the depreciated value. The respondent was not a fit and proper person to testify on the value of his own car. The best person to testify must be the person from the automobile industry who deals with Mercedes cars. Without the independent evidence, the respondent's evidence was at best to be regarded as a self service statement which could not be relied upon and should be rejected. (para 23)

(5) The respondent did not prove how he derived at the figure of RM6,439 as the loss of the use of the car for one month. There was no evidence to support his claim. The respondent had failed to discharge the burden of proof placed upon him. (para 25)

(6) The Sessions Judge had committed an error of law in awarding the whole amount of special damages claimed by the respondent. This was a fit and proper case for interference by the court exercising its appellate power. (para 26)

Case(s) referred to:

Billion Origin Sdn Bhd v. Newbridge Networks Sdn Bhd & Anor; Yap Burgess Rawson International Sdn Bhd (Third Party) [2006] 4 CLJ 113 HC ***(refd)***

Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***

MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC ***(refd)***

Parimala Muthusamy & Ors v. Projek Lebuhraya Utara-Selatan [1997] 4 CLJ 54 HC ***(refd)***

For the appellant - S Sivamohan; M/s Sivamohan Rajendran & Co
For the respondent - Harjinder Singh (Faradina with him); M/s Akberdin & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Hadhariah Syed Ismail JC:

Introduction

[1] The cause of action in this case arose out of an accident which occurs on the North-South Highway involving a motorcar driven by the respondent/plaintiff and a carcass of a wild boar. At the conclusion of the trial, on 12 February 2008, the learned Sessions Judge allowed the respondent's claim and made the following consequential order:

1. Liability

   Respondent/plaintiff – 10%

   Appellant/defendant – 90%

2. Special Damages

(a)	Loss of "non-claim bonus" (NCB)	– RM11,395.82
(b)	Extra charges for insurance claim	– RM 3,100
(c)	Replacement cost for intra red mirror	– RM 3,353.12
(d)	Loss of use of motorcar	– RM 6,439
(e)	Tow truck charges	– RM 350
(f)	Cost of repair of tyre	– RM 500
(g)	Depreciation of motorcar	– RM45,750
	Total	– RM70,887.94

3. Interest 8% on the judgment sum from the date of the accident till satisfaction.

4. Cost

Background Facts

[2] On 5 July 2001 around 1.30am, the respondent, while driving his Mercedes Benz motorcar model E240 Saloon year 1998 bearing registration number WHU 101 collided into a carcass of a wild boar which was on the North-South Expressway at KM 371.9. Prior to the said collision, there were already two cars which knocked into the carcass within a short period of time. He described how the accident happens as follows:

> Pada jam lebih kurang 9.00 malam, 4.7.02 saya dari Pulau Pinang mahu balik ke Klang dengan memandu motokar No. WHU 101 melalui Lebuhraya Utara-Selatan. Lebih kurang jam 1.30 pagi 5.7.02 apabila saya sampai di KM 371.9, saya nampak satu objek di atas jalan. Kerana sudah dekat, saya terlanggar objek tersebut. Kemudian saya berhenti dan turun dapati motokar mengalami kerosakan di bahagian hadapan, air bocor dan tayar belakang kanan pecah serta cermin hadapan retak. Kemudian saya diberitahu oleh pemandu motokar No. NAF 414, objek yang saya langgar adalah seekor babi …

[3] It was the respondent's case that the accident happens as a result of the appellant's negligence in maintaining the North -South Expressway. The appellant admits the accident happened but denied liability alleging they had taken all reasonable steps to ensure the safety of the road users with regular maintenance of the expressways.

[4] The main issues in this appeal are:

1. Was the accident caused by the appellant's negligence.

2. Was special damages proven.

Was The Appellant Negligent

[5] The burden to prove the appellant was negligent is on the respondent. This means that the respondent must prove that the damage caused to him is the kind of damage that could be foreseen by the appellant. As to the law or principle on negligence, I only need to refer to *Billion Origin Sdn Bhd v. Newbridge Networks Sdn Bhd & Anor; Yap Burgess Rawson International Sdn Bhd (Third Party)* [2006] 4 CLJ 113. Apart from that, it must also be remembered that every case of negligence will turn on its own facts – see *MA Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73.

[6] In saying the appellant is negligent, the respondent (PW1) testify:

> Saya percaya Defendan merupakan pihak yang bertanggungjawab untuk menyelenggara dan menyelia Lebuhraya tersebut telah gagal mengambil langkah-langkah keselamatan atau memberi perhatian khas di kawasan itu untuk mengelak sebarang haiwan daripada terlepas dan berkeliaran atau melintas atau berada di Lebuhraya tersebut pada hari kejadian.

[7] To support PW1's contention, the respondent rely on the evidence adduced by the appellant's witnesses, DW1 and DW3. In particular, during cross-examination, DW1 was asked the following question:

> Q: Setuju dengan saya pagar rosak dan bocor menyebabkan babi hutan melulu ke jalanraya?
>
> A: Tak semak pagar. Pegawai yang tengok.

[8] The same form of question was put to DW3 during cross-examination, which I reproduced below:

> Q: Kemalangan disebabkan oleh pagar bocor menyebabkan babi hutan masuk ke Lebuhraya?
>
> A: Ya

Evaluation Of The Evidence

[9] The learned Sessions Judge was persuaded to accept PW1's contention when he states:

> DW1 adalah seorang peronda Defendan. Sekiranya beliau yang kononnya meronda lebuhraya tersebut pada hari kemalangan berlaku hanya sekadar menyatakan "tak semak pagar", bagaimana pula orang awam seperti plaintif dapat menjangkakan kehadiran seekor babi hutan di tengah jalan dan mengancam keselamatan? Ini jelas membuktikan kecuaian Defendan yang tidak wajar dipertikaikan.

[10] It is obvious from the above that the Sessions Judge was of the view that failure to check the fences alone suffice to establish negligence on the appellant. I am of the opinion that the approach taken by trial judge in coming to his findings is wrong. The trial judge should have considered the answer given by DW1 in totality with the evidence of the other appellant's witnesses. What DW1 says is he himself did not check the fences, but his officers did. DW3 says he does not know whether the fences are damaged or not. It is therefore clear, both DW1 and DW3's evidence did not establish that the fences were damaged or there was a hole in the fences.

[11] Further the trial judge also failed to take into account undisputed relevant facts adduced by DW1 and DW3 in the followings: A

1. The area where the accident happens is not a wild animal prone area.

2. There was a possibility that the wild boar dig its way underneath the fences. B

[12] With fences put up and there was no previous case of a wild boar cutting across the highway, there was simply no necessity for the appellant to focus on the fences at the accident spot. The appellant C cannot be expected to guard a danger that cannot be reasonably foreseen in the first place. At the same time, the court cannot overlook the fact that a wild boar can make its way to the highway by digging underneath the fences. In short there are other possibilities that caused the wild boar to come out to the highway. Not necessarily damaged or D hole in the fences. Therefore it is not correct for the respondent to say with the wild boar crossing the highway, it must mean the fences were damaged or there was a hole in the fences. With that surrounding circumstances, to insist the appellant to ensure there was no damaged fences is akin to asking the appellant to guard against possibility of danger and not reasonably foreseen danger. With the facts presented E before me, I was of the view that the appellant had taken all reasonable steps necessary to safeguard the road users by not only putting up the fences but also done an interval checking of the same.

[13] To further support their case of negligence against the appellant, F the respondent relied on the High Court case of *Parimala Muthusamy & Ors v. Projek Lebuhraya Utara-Selatan* [1997] 4 CLJ 54 wherein PLUS was held liable in a suit for damages brought by the passengers of a motorcar which had knocked into a cow that had crossed the highway.

[14] The decision of the High Court in *Parimala*'s case was reversed G by the Court of Appeal with the consent of counsel for the plaintiffs. Be that as it may, I agree with the counsel for the appellant's contention that *Parimala*'s case is confined to its own facts. *Parimala*'s case did not set a principle of a strict liability situation wherein the appellant is held negligent each time a collision with a stray animal happen on a H highway. I find the facts in this case differs materially from *Parimala*'s case. In *Parimala*'s case, the following facts were established:

1. The accident area was a wild animal prone area and PLUS had knowledge of the previous accident but did nothing to alleviate the problem of animals straying onto the expressway. I

2. The fences were constantly damaged by the villagers to use the expressways as a shortcut and this was within the knowledge of PLUS.

3. Vandalism was rampant.

4. There was no monitoring system by PLUS at all at that time.

5. The vandalized fences were not repaired.

[15] The material differences seemed to be PLUS had knowledge not only of the damaged fences but also of repeat incidents and yet did not do anything about it. None of these features were present in the case before me. As such *Parimala*'s case is not applicable here.

[16] The crucial question to ask in deciding whether negligence is proven is was the accident foreseeable in the first place? The evidence of the appellant's witnesses revealed the following facts:

1. The stretch of the expressway where the accident occurred is not a wild or stray animal prone area. As such the appellant could not have foreseen the respondent's accident.

2. The appellant do not have a record to show that the fence at the place of the accident was damaged. Furthermore the wild boar has a peculiar natural habitat of digging or bore its way under the fence or concrete wall.

3. The appellant had erected fences along the expressway to ensure that the wild boar and/or stray animals do not enter the expressway. Since the accident spot is not identified as wild animal prone area, the fencing erected is sufficient.

4. DW3 testified that the fences would be inspected thoroughly every week and a simple inspection everyday. If there is any damage to the fences, it would be repaired immediately by the appellant.

5. The carcass of the wild boar was not left on the expressway for a very long period of time so as to endanger the other road users.

[17] The cumulative effect of all these evidence show the appellant had taken reasonable steps to ensure no wild animal run across onto the expressway. Evidence of damaged fences at the area of the accident was not established. In fact there was a probability that the wild boar dig under the fence to make its way onto the highway. This court cannot reject this possibility. If this was the case here, the appellant could not

be held to be negligent. The appellant had put up fences, they had weekly check on the fence, they repair the fence if it was damaged. It is virtually impossible to ask the appellant to ensure there is no hole underneath the fences that could enable any wild animal or creatures that posed danger onto the highway from making its way onto the highway. The reality is there is and always be a risk when you are driving a motorcar. The law only imposed liability for a danger that could reasonably be foreseen. We rarely heard of an accident involving a wild boar on a highway. That being the case, it is unreasonable to say the appellant should ensure the fences are not damaged and to ensure no stray animal making its way onto the highway. In the circumstances, on the balance of probabilities, I find the respondent has failed to prove negligence against the appellant.

Special Damages

[18] The law on proof of special damages is well settled in that it has to be strictly proven – see *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43. Learned counsel for the appellant contends that out of seven items of special damages as listed, only the following four items are proven, the total of which comes to RM7,303.12. They are:

(i)	cost to repair the wind screen and tinted	– RM3,353.12
(ii)	Insurance premium payment	– RM3,100
(iii)	Towing charges	– RM350
(iv)	cost to repair the tyres	– RM500

[19] Now I will deal with the rest of the items claimed.

Loss Of NCB

[20] The respondent produced his motorcar insurance policy, marked P13 to support his claim for loss of NCB amounting to RM11,395.82. This figure was derived as follows:

55% NCB bagi tahun pertama	– RM4,568.01
30% NCB bagi tahun kedua	– RM2,501.46
25% NCB bagi tahun ketiga	– RM2,084.55
16.67% NCB bagi tahun keempat	– RM1,389.98
10% NCB bagi tahun kelima	– RM833.82

[21] But the respondent failed to explain the mechanism of how did he obtain the percentage and the figures. Reading P13 alone, I am not able to understand how and on what basis the calculation is made. I was of the view that the only person qualified to testify on NCB is an officer from the insurance company itself. In the absence of acceptable explanation from the respondent, there is serious doubt whether the calculation and the amount claimed by the respondent were actually losses of 55% NCB and incurred as a result of the accident. I hold P13 *per se* did not prove a loss of 55% NCB. As such this claim is disallowed.

Depreciation Value

[22] Only oral evidence was adduced by PW1 to establish depreciation value of RM45,750. This is what he says:

> Kemalangan ini menyebabkan nilai pasaran kereta saya susut sehingga RM45,750.00 iaitu 15% daripada harga belian kereta.

[23] There was no supporting document. According to PW1, the figure was recommended by a second hand car dealer. There was also no independent witness to certify the depreciated value. I agree entirely with the appellant's contention that the respondent is not a fit and proper person to testify on the value of his own car. The best person to testify must be the person from the automobile industry who deal with Mercedes car. Without the independent evidence, the respondent's evidence at best is to be regarded as a self service statement which is not safe to be relied upon by the court and should be rejected. If the respondent's evidence is to be accepted it would create a dangerous precedent of giving an easy way of proving special damages. Unless the court uphold the principle of law, it would create harsh result and caused injustice to the party sued.

Loss Of Use

[24] Again, the respondent did not prove how he derived at the figure of RM6,439 as the loss of use of the car for one month. There was no evidence to support his claim. I would have expected the respondent to at least testify that he had to hire a car. But instead he only gave one line sentence as follows:

> Saya kehilangan penggunaan kereta tersebut sebanyak RM6,439.00.

[25] Obviously that evidence is not sufficient to prove he has suffered a loss of RM6,439. He must prove that he had spent this much of money as a result of the damaged to the car. The respondent has failed to discharge the burden of proof placed upon him.

[26] For the above mentioned reasons, the sessions judge had committed an error of law in awarding the whole amount of special damages claimed by the respondent. This is a fit and proper case for interference by the court exercising its appellate power. I therefore allowed this appeal with cost. The decision of the sessions court is set aside.